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Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF APPELLEE

John Cary Sims
(Counsel of Record)

Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation of
Washington

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TAXATION WITH REPRESENTATION OF WASHINGTON,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee Taxation with Representation of Washington ("Taxation") is a nonprofit charitable corporation, and as such it is dependent upon contributions for the support of its activities.[1] Its success in attracting contributions in turn depends largely on the availability of a government benefit in the form of tax deductions to donors who contribute to it. Solely because Taxation has chosen to exercise its First Amendment rights by engaging in substantial lobbying, gifts to it are not tax-deductible. Meanwhile, other groups, such as veterans' organizations, may receive tax-deductible gifts without laboring under a comparable restriction on their lobbying. It is this disparity in treat-

[1] Appellee has no parent companies, subsidiaries, or affiliates within the meaning of Rule 28.1.

ment which provides the basis for this challenge to the constitutionality of the lobbying restriction.[2]

Taxation was incorporated in 1977 under the District of Columbia Non-profit Corporation Act. (J.A. 27-34). The organization's articles of incorporation state that it is organized "[t]o promote charitable activities within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954." (J.A. 29). Soon after it was formed, Taxation filed an application for recognition of tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). (J.A. 35-45). The application explained that Taxation intended to take over the lobbying and litigation activities which were being conducted by two other nonprofit corporations, Taxation with Representation and Taxation with Representation Fund. (J.A. 39). Taxation provided the following description of its intended lobbying activities:

> Taxation with Representation of Washington (TWRW) is a public interest organization that deals solely with federal tax issues. Its goal is to make sure that the general public is represented by skilled professionals when tax issues are under discussion in Congress, in the Executive Branch or before the courts.
>
> The tax laws are now so complex that ordinary citizens find it difficult to speak out intelligently

---

[2]Since the challenged classification is created by federal statutes, the Fifth Amendment rather than the Fourteenth is controlling. It makes no difference that the Fifth Amendment does not contain a specific guarantee of equal protection of the laws, since "if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). *Accord, Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

> on tax matters. TWRW seeks to ease the resulting problems by encouraging tax professionals to speak out on behalf of the public.
>
> TWRW seeks out persons who wish to represent the general public, including members of the tax bar, public finance economists, teachers of accounting and tax law and other tax specialists. It then helps them to prepare and publicize testimony and to follow up their presentation with informal contacts and discussions to insure that their message is heard. Particular attention is devoted to administrative proceedings and to legislative hearings at which the general public is not otherwise represented.

(J.A. 37). Taxation was denied the tax exemption it sought solely because the IRS found that the organization's "stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities." (J.A. 47).[3]

As applicable to Taxation, section 501(c)(3) may be viewed as containing four requirements. First, the organization must be "organized and operated exclusively" for charitable, educational, or other exempt purposes. As noted above, Taxation is so organized and would be operating in that manner, but for the denial of the exemption it sought. (J.A. 29).[4] Second, it must be shown that

[3]The government states that Taxation was "formed for the purpose of attempting to influence tax legislation." Govt. Brief at 10. *See also id.* at 49. The government thus overlooks the fact that Taxation's charitable purposes are "[r]elief of the poor, the distressed, and the underprivileged; and the defense of human and civil rights secured by law." (J.A. 29). Lobbying is one *means* by which these goals will be pursued. *See* pages 5-6 *infra*.

[4]Due to the denial of its application for a tax exemption, Taxation has not been able to commence its activities. Taxation with Representation Fund (now known as Tax Analysts) publishes the weekly journal *Tax Notes*, but it does no lobbying. In June 1980, Taxation with

"no part of the net earnings [of the organization] inures to the benefit of any private shareholder or individual." Once again, Taxation's articles of incorporation contain the required restriction. (J.A. 31). Third, a section 501(c)(3) group may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Taxation's articles of incorporation specifically prohibit such political activities (J.A. 31), and its application stated that it "will not seek to intervene in political campaigns." (J.A. 41).

Thus, the sole reason for denial of the section 501(c)(3) tax exemption sought by Taxation related to the fourth condition, which limits the availability of exemptions to groups "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." Because lobbying constitutes a substantial part of Taxation's intended activities, the organization could not comply with section 501(c)(3) as written, and it brought this action pursuant to 26 U.S.C. § 7428 to have the lobbying restriction declared unconstitutional.[5]

Representation distributed all of its assets and liabilities to Tax Analysts and became inactive. If Taxation is successful in this action and obtains a section 501(c)(3) exemption, it will carry out the activities described in its application for exemption, including substantial lobbying in furtherance of its exempt purposes.

[5]The government states that Taxation has been denied section 501(c)(3) status in order to head off "wholesale public subvention of partisan interests" and in order to prevent charities like Taxation from engaging in "substantial partisan activities." Govt. Brief at 11, 15. These statements appear to be calculated to raise the specter of partisan political activities by charities, but, as already explained, such activities are specifically prohibited by a provision of section 501(c)(3) which is not challenged in this case, as well as by Taxation's articles of incorporation and its application for exempt status. (J.A. 31, 41).

The denial of section 501(c)(3) status to Taxation solely because of its intended lobbying greatly reduces its ability to raise funds. Under the Internal Revenue Code, the deductibility of donations for federal income, estate, and gift tax purposes depends on the recipient organization's compliance with a "no substantial lobbying" condition which is equivalent to that contained in section 501(c)(3). Code §§ 170(c)(2) (income tax); 2055(a)(2), 2106(a)(2) (estate tax); 2522(a)(2) (gift tax). Under these statutes, Taxation's failure to comply with the lobbying restriction has resulted in its exclusion from the Internal Revenue Service's "Cumulative List" of organizations entitled to receive tax-deductible donations. As this Court has noted, "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974); *see id.* at 730 n.3; *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 763-75 (1974) (Blackmun, J. dissenting).[6]

Just as the failure to comply with the lobbying restriction and the resulting denial of the opportunity to solicit gifts which will be tax-deductible to donors may seriously impair a charity's ability to raise funds, compliance with

[6]For simplicity, we will refer only to section 501(c)(3) in discussing the restriction on lobbying, although the most important consequences of failure to qualify under section 501(c)(3) are caused more immediately by the operation of the other statutes which incorporate the section 501(c)(3) lobbying restriction, particularly section 170(c)(2). As this Court observed in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976), "Section 501 is the linchpin of the statutory benefit system." In addition to being entitled to receive tax-deductible contributions, an organization which qualifies under section 501(c)(3) is exempt from federal unemployment and social security taxes. Internal Revenue Code §§ 3306(c)(8), 3121(b)(8)(B).

the restriction may make it difficult or impossible for a charitable group to carry out the mission for which it was formed.[7] Lobbying for its own sake would not be considered charitable *per se*. But lobbying, like litigation, *see In re Primus*, 436 U.S. 412 (1978), will often be an important element in the overall program pursued by a charitable group in attempting to achieve its purposes. The fact that lobbying is used as a means of promoting a charitable goal in no way alters the charitable character of the goal. G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 378 (rev. 2d ed. 1977); IV *Scott on Trusts* § 374.4, at 2912 (3d ed. 1967); 2 *Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax. 1415, 1422-23 (1973). Considering the pervasive role played by federal, state, and local legislation, many charities could not hope to put their programs into effect without attempting to influence legislation. *See* J.A. 25 (lobbying is an essential means of bringing about changes in federal tax policy); Brief of American Association of Museums, *et al.* at 5-6 (lobbying is necessary to the promotion of charitable goals in such areas as public health, assistance to the needy, and environmental protection); Caplin & Timbie, *Legislative Activities of Public Charities*, 39 Law & Contemp. Prob. 183, 197 (1975) ("many important charitable goals can be achieved only with the aid of legislation").

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[7] In this brief, the shorthand expression "charity" will be used to refer to a charitable, educational, religious, or similar group which qualifies for a tax exemption under section 501(c)(3) of the Internal Revenue Code and which is not a private foundation. *See* Code § 509(a). Such groups will also sometimes be referred to as "public charities."

Public charities other than churches may now elect to have the limitation on their lobbying set by Code sections 501(h) and 4911 rather than by the "substantiality" test of section 501(c)(3). *See* Govt. Brief at 38-39 n.20. Taxation has not elected to be covered by these provisions, nor does it intend to do so. (J.A. 18). This alternative method of determining the amount of lobbying which a charity may conduct has little if any relevance to this case, because all charities remain subject to either the section 501(c)(3) or the section 501(h) limitation. (J.S. App. 18a-19a n.6). As indicated by the various *amicus* briefs, both charities and veterans' groups believe that having their lobbying restricted by these statutes impairs or would impair their ability to carry out their exempt functions. Thus, Taxation and the *amici* charities oppose application of the restrictions to charities, and the *amici* veterans' groups oppose application of the restrictions to veterans' groups.[8]

In contrast to public charities such as Taxation, veterans' organizations are free to engage in unlimited lobbying in furtherance of their exempt purposes, and fraternal societies are also granted preferred status with respect to lobbying. *See* Internal Revenue Code §§ 501(c)(19),

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[8]The court of appeals expressed the view that the lobbying restriction is of limited practical effect because a "group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes." (J.S. App. 34a). The court's statement had no support in the record, and it is incorrect. There are a number of disadvantages to the dual organization approach suggested by the court, and these are set out in the affidavit filed by Taxation in the district court (J.A. 20) and in the *amicus* brief filed by a number of charities in support of Taxation's position. *See* Brief of American Association of Museums, *et al.* at 12-21. For a description of the section 501(h) lobbying restriction and its impact on charities who elect to be covered by it, see *id* at 25-28.

170(c)(3), 2055, 2522 (veterans' organizations); §§ 501(c)(8), 501(c)(10), 170(c)(4), 2522 (fraternal societies).[9]

The court of appeals summarized the effect of the statutory provisions as follows:

> For purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.
>
> * * *
>
> An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

(J.S. App. 17a, 23a). The court found that this discrimination is unconstitutional:

> [T]he Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here.

[9]Fraternal societies are accorded tax treatment which is slightly less favorable than that of veterans' groups. For example, such societies may receive bequests which are exempt from estate taxation under section 2055(a) only if they do not engage in substantial legislative activity, and tax-deductible gifts under section 170(c)(4) may be made only by individuals. Despite these slight variations, both veterans' groups and fraternal societies receive the substantial equivalent of an exemption under section 501(c)(3), but without restrictions on their freedom to lobby. Because veterans' groups conduct much more lobbying than do fraternal societies (*see* J.S. App. 23a-24a & n.11, 72a n.49), this brief will focus on them. Likewise, there will be no discussion of such groups as cemetary associations (*see* Govt. Brief at 48-49), which generally are not active in lobbying.

> The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions.

(J.S. App. 66a).

In addition to making the equal protection argument on which it prevailed in the court of appeals, Taxation advanced a related but independent First Amendment challenge to the lobbying restriction imposed on charities. Taxation's alternative theory was that, even apart from the difference in treatment between charities and veterans' groups, the lobbying restriction contained in section 501(c)(3) violates the First Amendment rights of charities. While acknowledging that Taxation's argument "has some strength" (J.S. App. 32a), the majority rejected the First Amendment claim. (J.S. App. 34a). The dissenters also rejected the First Amendment claim, although for different reasons. (J.S. App. 87a-106a).[10]

The only relief sought by Taxation is a declaration that it is entitled to be recognized as an exempt organization under section 501(c)(3) of the Code. (J.A. 10). The government has never disputed Taxation's contention

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[10]Taxation raised the First Amendment argument in a Jurisdictional Statement on Cross-Appeal (No. 82-134), but this Court has not yet acted on that appeal. The First Amendment theory would nonetheless constitute a proper basis upon which this Court could declare section 501(c)(3) to be unconstitutional, since this case is on appeal under 28 U.S.C. § 1252, which brings the whole case up to this Court. *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980); *McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975); *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960). In any event, the First Amendment and equal protection aspects of this case are so thoroughly intertwined that this Court should exercise its power to address the First Amendment issue. *See Brown v. Socialist Workers '74 Campaign Committee*, 103 S. Ct. 416 (1982).

that, if the lobbying restriction is unconstitutional, the granting of tax-exempt status would be the proper remedy. Nonetheless, the court of appeals' majority expressed the view that "[i]t seems evident that the legislative judgment expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations." (J.S. App. 76a). However, the court of appeals did not decide the issue, at least in part because the veterans' groups which would be affected by an extension of the lobbying restriction had not been involved in the litigation. (J.S. App. 76a). Instead, the court remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief." (J.S. App. 77a). Four veterans' groups – The American Legion, The Veterans of Foreign Wars of the United States, Disabled American Veterans, and Paralyzed Veterans of America – then sought to intervene, both in the court of appeals and in this Court, but intervention was denied. However, the four groups have filed briefs as *amici curiae* in this Court, taking the position that there is no constitutional violation, and that, if there is a violation, it should be cured by removing the lobbying restriction now applied to charities.[11]

[11] *Amicus* Veterans of Foreign Wars of the United States argues that the district court lacked jurisdiction because Taxation's claim is based on a constitutional challenge to section 501(c)(3). Brief at 4-14. The VFW takes the position that 26 U.S.C. § 7428 should be interpreted to exclude such a constitutional claim from the class of declaratory judgment actions authorized by the statute. However, there is nothing in the language of section 7428 or in its legislative history to indicate that the declaratory judgment procedure created in 1976 was meant to be limited to non-constitutional issues. The expressed intent of Congress was to overturn the result reached in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416

SUMMARY OF ARGUMENT

This case raises an equal protection challenge to the regulation of First Amendment rights. Under sections 501 and 170 of the Internal Revenue Code, public charities cannot qualify to receive tax-deductible contributions if they engage in substantial lobbying. Charities must therefore choose between forgoing the exemption under section 501(c)(3) to which they would otherwise be entitled, which greatly impairs their ability to raise funds, and forgoing substantial lobbying, which may seriously impair their ability to promote their charitable purposes. Meanwhile, veterans' organizations may receive tax-deductible contributions even though they are subject to no similar restriction on their lobbying activities.

The government contends that the "rational basis" standard of review should be applied in this case, since in its view the lobbying restriction has only an incidental impact

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U.S. 752 (1974). Since *Americans United* was itself a challenge to the constitutionality of the lobbying restriction contained in section 501(c)(3), Congress certainly did not intend to foreclose the type of action brought by Taxation. Moreover, the exception which the VFW suggests should be read into the statute conflicts with the congressional intent to provide an applicant with a speedy and certain route by which to obtain an authoritative determination on its claimed entitlement to exempt status. *See, e.g.*, H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 286 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2897, 3182 (the declaratory judgment provision "is intended to facilitate relatively prompt judicial review of the specified types of exempt organization issues"); S. Rep. No. 94-938, 94th Cong., 2d Sess. 588 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 3439, 4012. Taxation exhausted its administrative remedies (J.A. 47-48, 50), and filed suit only after it received "a determination by the Secretary" which denied its application. Nothing in section 7428 deprives the courts of jurisdiction simply because the administrative denial of exempt status was based on an unconstitutional statutory provision. It is also worth noting that the government, which will always be the defendant in a section 7428 action, has never questioned the interpretation of the statute under which the district court and the court of appeals exercised jurisdiction.

on the exercise of First Amendment rights. However, this approach overlooks the fact that the restriction substantially impairs expressive activity – indeed, it has no other purpose.

Several independent lines of authority establish the appropriateness of strict judicial review in this case. First, the lobbying restriction imposes an "unconstitutional condition" on the exercise of First Amendment rights. The government does not deny that it would be unconstitutional for Congress to prohibit lobbying or to penalize those who engage in it. Since the government may not do indirectly what the Constitution forbids it to do directly, the withholding of tax benefits to accomplish the same end is equally impermissible.

Second, there is no requirement that Taxation establish an independent First Amendment violation in order to be entitled to have a strict standard of review applied. It is enough that the organization's First Amendment activities are "regulated" by the statute. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290 (1981). Moreover, the statutes governing tax-exempt groups are both "content-based" and "speaker-based." The First Amendment leaves a legislature very little leeway when a statute discriminates among speakers based on who they are or what they intend to say. Section 501(c) favors one category of speakers (veterans) over another (charities), and the reach of the statutory prohibition is defined by the content of the speech in which each group wishes to engage. Moreover, the only speech which is forbidden is advocacy concerning legislation, a form of political expression which lies at the core of First Amendment freedoms.

The legislative history of the lobbying restriction is very

sparse. What little is known about Congress' motives in establishing the challenged discrimination against lobbying by charities falls far short of the compelling government interest required by this Court's precedents. The government relies on *Cammarano v. United States,* 358 U.S. 498 (1959), which it says demonstrates that a policy of "neutrality" toward lobbying underlies the statute. However, the fact that no restriction is imposed on lobbying by veterans' groups is alone sufficient to demonstrate that the notion of "neutrality" toward lobbying is an illusion. Moreover, after *Cammarano* was decided Congress overruled it legislatively, recognizing that it is in the national interest to *encourage* interested parties to lobby Congress and other legislative bodies concerning legislation which is under consideration. Section 162(e) of the Internal Revenue Code, which was passed in 1962, allows business taxpayers to take deductions for almost all of their lobbying, and the same policy which underlies section 162(e) calls for charities to be allowed to inform legislators about how their charitable work will be affected by legislative proposals.

The government speculates that the lobbying restriction is designed to prevent unspecified "abuses' by charities which might lead to the diversion of charitable funds to serve private ends. However, if that is the purpose of the restriction, the statute is both underinclusive and overinclusive.

The restriction does not address the possibility of "abuses" by veterans' groups, nor does it do anything to prevent improper activities which involve any technique other than lobbying. On the other hand, charities are deprived of the benefits of section 501(c)(3) status even if no improper activities have taken place — substantial lob-

bying solely in furtherance of proper charitable goals is not allowed. Moreover, a charity which conducts substantial lobbying does not lose only a proportionate share of the benefits of section 501(c)(3) status. Unlike the business taxpayers in *Cammarano*, who lost deductions only for the amounts actually spent on lobbying, a charity which cannot qualify under section 501(c)(3) because of substantial lobbying loses, for *all* contributions made to it, the right to offer deductibility to donors. The correlation between the ends said to be served by the statute and the means used is nowhere near as precise as is required when First Amendment rights are being regulated.

Another line of argument presented in support of the statute attempts to demonstrate that there are differences between charities and veterans' groups which justify allowing only the latter to conduct substantial lobbying. However, the alleged differences either do not exist at all, or do not have any constitutional significance. Thus, although veterans' groups are required to direct their lobbying solely toward achieving charitable ends, charities are similarly restricted. Veterans' groups may not engage in partisan political activity, but neither may charities. Veterans' groups carry out socially beneficial activities, but the applicable statutes require no less of charities.

If this statutory classification is to be sustained, it must be upheld on the theory that Congress has a right to grant a preferred status with regard to the exercise of First Amendment rights to one group of speakers relative to another. Yet that is precisely the sort of determination that is forbidden by such decisions as *Police Department v. Mosley*, 408 U.S. 92 (1972), and *Carey v. Brown*, 447 U.S. 455 (1980). Congress has a great deal of freedom in deciding what benefits constitute an appropriate reward

for those who have served in the armed forces, but enhanced First Amendment rights cannot properly be used as a type of currency to discharge the nation's debt to its veterans.

ARGUMENT

I. THE RESTRICTION ON LOBBYING WHICH IS AT ISSUE IN THIS CASE IS SUBJECT TO AN EXACTING STANDARD OF JUDICIAL REVIEW.

The discriminatory regulation of lobbying by charities which is challenged by Taxation in this case must be measured against the rigorous standard of review which is traditionally applied in First Amendment cases. As this Court recently stated in *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290, 294 (1981), "regulation of First Amendment rights is always subject to exacting judicial review." *See id.* at 298. The applicability of such a standard in this case is of special significance, since the government virtually concedes that the discrimination against charities can be sustained only if it is measured against the less demanding "rational basis" standard. Indeed, the government limits its discussion of strict scrutiny to the bald assertion in a footnote that "the statutes in question could be upheld even under a heightened standard of judicial scrutiny." Govt. Brief at 47 n.27. Since the government makes no real effort to show that such a standard could be met, and the record in this case demonstrates conclusively that no compelling government interest exists and that the means chosen are not the least restrictive which are available, the government's appeal must fail if this Court applies the more demanding standard of review.

A. Lobbying Is Protected By The First Amendment.

Although the government does not specifically discuss the issue in its brief, there can be no doubt that the court of appeals was correct in holding that "lobbying comes within the protection of the First Amendment." (J.S. App. 29a). Free discussion of governmental affairs has long been recognized as "indispensable to decisionmaking in a democracy." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Moreover, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control v. City of Berkeley, supra*, 454 U.S. at 294.[12]

No organization may qualify for tax exemption under section 501(c)(3) if a substantial part of its activities consists of "carrying on propaganda, or otherwise attempting, to influence legislation." Whatever uncertainties there may be as to the reach of the First Amendment at its extremities, presentation of information to legislators on issues of public policy is at the very core of the activities which that Amendment shields from governmental restraint. Our society is one which has made "a profound

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[12]Although Taxation bases its case on various First Amendment freedoms — including speech, association, and petition — a separate discussion of each claimed right will not be attempted. "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *See also Citizens Against Rent Control v. City of Berkeley, supra*, 454 U.S. at 300 (the right of association and the right of expression "overlap and blend"); *Healy v. James*, 408 U.S. 169, 181 (1972).

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). *See Buckley v. Valeo,* 424 U.S. 1, 47-49 (1976). That commitment springs from the realization that there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 339 (1974), and that only the freest competition among ideas adequately provides a basis for the resolution of public questions. *Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 295. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776, *quoting Thornhill v. Alabama,* 310 U.S. 88, 102 (1940).

The activities which the government claims a right to regulate are an essential part of the process by which citizens bring to the attention of lawmakers their support for, objections to, or ideas concerning existing or proposed legislation. "While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." *Liberty Lobby, Inc. v. Pearson,* 390 F.2d 489, 491 (D.C. Cir. 1968) (Burger, J.). *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972). The free exchange of ideas protected by the First Amendment includes the opportunity to persuade, rather than merely to set forth facts or engage in abstract discussion. *Buckley v. Valeo, supra,* 424 U.S. at 14-15, 48; *Mills v. Alabama, supra,* 384 U.S. at 219; *NAACP v. Button,* 371 U.S. 415, 437

(1963); *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Thus, the district court and the court of appeals correctly concluded that Taxation's lobbying activities are clearly protected by the First Amendment. (J.S. App. 5a, 29a).

B. A Strict Standard Of Review Should Be Applied Because Section 501(c)(3) Abridges Taxation's First Amendment Rights By Placing An Unconstitutional Condition Upon Their Exercise.

The parties are in agreement that the lobbying restriction must be measured against a strict standard of review if it directly infringes on Taxation's First Amendment rights. Govt. Brief at 11, 24, 29. The crux of the government's argument that the discriminatory lobbying regulation at issue in this case need only be shown to be supported by a rational purpose is the assertion that it has only an "indirect impact upon the exercise of a constitutionally recognized right." Govt. Brief at 18. In the government's view, tax exemptions "granted to certain organizations and withheld from others are a matter of legislative grace, not of constitutional entitlement." *Id.* at 24. Thus, argues the government, "Congress need only show that its decision to encourage a particular activity or interest is a rational means to a legitimate governmental end." *Id.*

The government places great emphasis on the fact that section 501(c)(3) does not flatly prohibit Taxation from engaging in efforts to influence legislation which would advance its charitable purposes. It correctly notes that the statute declares that such efforts, if substantial, will make the organization ineligible for the government assistance to which it would otherwise be entitled. However, the

government's use of an indirect mechanism for preventing lobbying, instead of imposing an outright prohibition, does not resolve the constitutional issues presented. It has been held time and again by this Court that First Amendment freedoms are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972); *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring in the result); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). Revenue laws which penalize the exercise of First Amendment rights are subject to the same strictures. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Nor may the government grant or withhold tax privileges in a manner which interferes with the exercise of First Amendment rights. *Speiser v. Randall*, 357 U.S. 513 (1958). *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (the discriminatory denial of tax exemptions may violate the First Amendment).

The particular form of interference that is involved here is often called an "unconstitutional condition." This Court has summarized the controlling principle of law in this fashion:

> [T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the Federal Constitution.

United States v. Chicago, M., St. P. & P.R.R., 282 U.S. 311, 328-29 (1931). Thus, "whatever an express constitutional provision forbids government to do directly it equally for-

bids government to do indirectly." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1429, 1445-46 (1968).

Speiser v. Randall, supra, involved facts strikingly similar to those presented in this case. There, honorably discharged World War II veterans sought the benefit of the veterans' property tax exemption provided in the California constitution, but declined to subscribe to the required oath that they did not advocate the overthrow of the government. This Court held that conditioning the tax benefit on taking the oath was unconstitutional:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

357 U.S. at 518.

The government responds to *Speiser* and the line of authority it represents by citing *Cammarano v. United States*, 358 U.S. 498 (1959). *Cammarano* is discussed *infra* at pages 35-37 with respect to the government's reliance on the decision as allegedly stating the congressional purpose underlying the lobbying restriction. To the extent that the government argues that *Cammarano* justifies applying the "rational basis" standard of review in this case (*see* Govt. Brief at 12-14, 19-27), that reliance is also misplaced. This Court's conclusion in *Cammarano* that the regulation at issue there was "not 'aimed at the suppression of

dangerous ideas,'" 358 U.S. at 513, *quoting Speiser v. Randall, supra,* 357 U.S. at 519, was explicitly based on the nondiscriminatory nature of the regulation. Because the classification challenged in this case discriminates against charities and in favor of veterans' groups, it is not shielded by *Cammarano*. Moreover, because the restriction placed on charitable lobbying by section 501(c)(3) is intended to and does inhibit certain expression by charities, it must be subjected to strict judicial review. *See, e.g., Linmark Assoc. v. Township of Willingboro,* 431 U.S. 85, 93-94 (1977). *Cammarano* is also distinguishable because the taxpayers there were denied tax benefits only to the extent they actually spent money on lobbying. The result would have been different if there had been the disproportionate penalty which is imposed on charities under section 501(c)(3). Charities which engage in substantial lobbying are denied the right to receive *any* tax-deductible donations. *See Harris v. McRae,* 448 U.S. 297, 317 n.19 (1980); *Maher v. Roe,* 432 U.S. 464, 474-75 n.8 (1977); *Cammarano v. United States, supra,* 358 U.S. at 515 (Douglas, J., concurring). *Speiser* represents not an

Speiser represents not an aberration, but the application of a constitutional principle to which this Court has consistently adhered, as is apparent from *Perry v. Sindermann,* 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.

Accord, McDaniel v. Paty, 435 U.S. 618, 626 (1978); *Madison School District v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Sherbert v. Verner,* 374 U.S. 398, 404-05 (1963); *Shelton v. Tucker,* 364 U.S. 479, 485-86 (1960); *Wieman v. Updegraff,* 344 U.S. 183, 192 (1952); *Frost v. Railroad Comm'n,* 271 U.S. 583, 593 (1926) ("In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, – an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden."). Moreover, members of this Court have observed that its decisions "have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod v. Burns,* 427 U.S. 347, 358 n.1 (1976) (plurality opinion). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-34 (1977); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977).

Therefore, for purposes of constitutional analysis, the withholding of the advantages of section 501(c)(3) status is no different from the withholding of a direct government grant to which an organization would be entitled, but for its lobbying. Any program of government assistance can be drafted as either a tax expenditure or as a direct spending program. Thus, the indirect aid provided to charities and other exempt organizations through the device of tax-deductibility for contributions is a system of "tax expenditures," which is the functional, financial, and constitutional equivalent of a direct government payment.[13] As

[13]In fact, under the procedures adopted by the Congressional Budget Act of 1974, P.L. No. 93-344, 88 Stat. 297, the deductions taken by taxpayers for charitable contributions are evaluated for their

such, it may not be withheld to penalize the exercise of First Amendment rights.

The "unconstitutional condition" doctrine was recently restated and applied by this Court in *Thomas v. Review Board*, 450 U.S. 707 (1981). Mr. Thomas had been denied state unemployment compensation benefits after he had voluntarily left his employment because of religious convictions. This Court held that "the coercive impact on Thomas" was indistinguishable from that found to be unconstitutional in *Sherbert v. Verner, supra.* Although the compulsion to which Thomas was subjected was characterized as "indirect" because it took the form of denial of a government benefit, 450 U.S. at 717-18, this Court concluded that the infringement upon free exercise was substantial. *Id.* at 718. The state was required to justify the burden on religious practice "by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* Although this case involves the rights of expression, petition, and association rather than free exercise, and tax exemption instead of unemployment benefits, the constitutional standard remains the same. Accordingly, the government is in error in its contention that the lobbying restriction does not penalize Taxation's exercise of First Amendment rights. The restriction may be sustained only if it is necessary to achieve a compelling governmental purpose and is a narrowly drawn as possible.

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impact on the budget just as direct government payments would be. *See generally* Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. Indust. & Com. L. Rev. 679 (1976). This Court has also recognized the equivalence of direct grants and tax benefits for constitutional purposes. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 790-91 (1973) (declaring a tax benefit system invalid under the Establishment Clause). *See also Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979); *Green v. Connally*, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd mem.*, 404 U.S. 997 (1971).

C. Because The Equal Protection Claim Presented In This Case Involves Government Regulation Of First Amendment Rights, Only An Exacting Standard Of Review Would Be Appropriate Even If No Independent First Amendment Claim Could Be Established.

Even if Taxation had not shown an abridgment of its First Amendment rights, *Citizens Against Rent Control v. City of Berkeley, supra*, requires that a strict standard of judicial review be applied in deciding the equal protection issue, since First Amendment rights unquestionably are regulated by section 501(c)(3). In that case, this Court began its analysis by noting that it was undisputed that the ordinance at issue there had "an impact on First Amendment rights." 454 U.S. at 294. Here, the government does not deny that section 501(c)(3) has an impact on First Amendment rights, nor could it do so in light of the fact that on its face the statute directs charities to refrain from substantial lobbying if they wish to enjoy the statute's benefits. Moreover, the decision in *Citizens Against Rent Control* makes it clear that "regulation of First Amendment rights is always subject to exacting judicial review." 454 U.S. at 294. *See id.* at 298. The government cannot deny that lobbying by charities is at least "regulated" by the statute, even though it presumably does not agree that the regulation oversteps the bounds of the First Amendment.

Even prior to *Citizens Against Rent Control*, the decisions of this Court required that strict scrutiny be utilized when First Amendment rights are regulated. It has long been established that First Amendment rights of the type involved in this case occupy a preferred place in our system of government. *Thomas v. Collins, supra*, 323 U.S.

at 530. Accordingly, because the discrimination here involves these fundamental rights, it can be sustained only if shown to be necessary to promote a compelling government interest. *Dunn v. Blumstein*, 405 U.S. 330, 335-37 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Williams v. Rhodes, supra*, 393 U.S. at 31; *see Elrod v. Burns, supra*, 427 U.S. at 362; *NAACP v. Button, supra*, 371 U.S. at 438.

Carey v. Brown, 447 U.S. 455 (1980), illustrates the manner in which this Court has traditionally decided what standard of review should be applied in an equal protection case implicating the exercise of First Amendment rights. That case involved a statute which prohibited some, but not all, picketing of residential property, and the Court applied the rigorous standard of judicial review:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications for any distinctions it draws must be carefully scrutinized.

447 U.S. at 461-62.

Nonetheless, the government argues that section 501(c)(3) should not be reviewed under the standard traditionally applied in First Amendment cases because the statute does not go so far as to impose a flat prohibition on lobbying by charities. Govt. Brief at 27-28 & n.13. According to the government, the statute should be measured against a standard of rationality because it merely penalizes lobbying (by withholding the benefits of a section 501(c)(3) tax exemption) rather than prohibiting it altogether. However, as discussed above at pages 18-23,

this Court repeatedly has held that a penalty imposed on the exercise of a First Amendment right must be evaluated no differently than a more direct interference with its exercise.

Moreover, the distinction which the government would like to make between "prohibitions" and "lesser" restrictions is little more than an exercise in semantic gameplaying and is of no constitutional significance, as a number of the decisions of this Court demonstrate. For example, in *Healy v. James, supra,* there was no prohibition on free speech activities, merely a university's withholding of official recognition for a student group. Students remained free to undertake expressive activities as individuals, and there were no restrictions at all on their freedom to get together in groups off campus. 408 U.S. at 182-83. Similarly, the regulation at issue in *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980), applied only to bill inserts concerning controversial issues of public policy; all other avenues of expression remained unrestricted. And in *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), charitable organizations were restricted only as to one form of activity – the raising of funds through door-to-door solicitation – and such solicitation was only regulated, not prohibited entirely. *See also Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 304 (White, J., dissenting). Despite the absence in these cases of anything that could fairly be described as an "absolute prohibition" on expressive activity, *see* Govt. Brief at 27-28 n.13, in each of them this Court applied the traditional, strict standard of review used in First Amendment cases.

Stated another way, the government's argument is similar to the assertion that the regulation of speech in one

forum does not trigger strict judicial review if the would-be speaker has access to some alternative forum. However, when arguments along these lines have been presented to this Court, they have been uniformly rejected. Thus, in *Schneider v. State,* 308 U.S. 147, 163 (1939), this Court held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* was applied and reaffirmed in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), where a promoter challenged the decision of the City of Chattanooga to refuse use of a city-controlled theater for the play "Hair." The Court held that whether the promoter might have used some other, privately-owned theater in the city for the production was "of no consequence." *Id.* at 556. Likewise, in *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981), this Court found a prohibition of live entertainment unconstitutional, even though such entertainment was available to residents who were willing to travel to nearby communities. *See also id.* at 78 (Blackmun, J., concurring). These precedents, and the similar ones cited above, demonstrate that section 501(c)(3) must be measured against the strict standard of review applied in First Amendment cases, because it regulates the exercise of Taxation's First Amendment rights.

D. The Regulation Of Speech Which Is Challenged In This Case Is Content-Based, And Therefore It Should Be Subjected To An Especially Stringent Standard Of Review.

The First Amendment's hostility to content-based regulation of speech is indisputable. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n, supra,*

447 U.S. at 537. The only reason given by the government in denying that section 501(c)(3)'s restriction on lobbying is content-based is the assertion that the "limitation upon lobbying activities is neutral as to the points of view appellee would espouse." Govt. Brief at 27. *See id.* at 23 n. 10 ("these limitations . . . do not 'penalize' appellee for the content of its advocacy"). However, this argument must fail because, even if the restriction is "viewpoint" neutral, it is still be "content-based" because the reach of the regulation is defined in terms of the content of speech (*i.e.*, it applies only to advocacy concerning legislation). *See Carey v. Brown, supra,* 447 U.S. at 462 ("it is the content of the speech which determines whether it is within or without" the regulation).[14]

This Court's decision in *Consolidated Edison Co. v. Public Service Commission, supra,* demonstrates that a broad restriction on speech about a particular subject is "content-based" even if it is neutral as to the points of view expressed. In *Consolidated Edison,* the Public Service Commission defended its ban on a utility's use of bill inserts to proselytize on controversial issues such as nuclear

[14]Even if a truly "neutral" subject-matter restriction would not be considered "content-based," the classification challenged here is not neutral, for it favors veterans' groups over charities. When discrimination is based on the identities of the speakers, even in a manner which appears to be neutral as to the viewpoints expressed, viewpoint discrimination is almost always to be found beneath the surface. As the United States Court of Appeals for the Seventh Circuit recently observed, "speech restrictions keyed to the identity of the speaker are always scrutinized strictly" because "they almost invariably are not neutral with respect to the viewpoints they tend to disfavor. Indeed, the fact that the Supreme Court has never distinguished sharply between speaker discrimination and impermissible subject matter restrictions . . . itself tends to indicate that the same fundamental evil underlies both." *Perry Local Educators' Ass'n v. Hohlt,* 652 F.2d 1286, 1295 (1981), *consideration of jurisdiction postponed,* 454 U.S. 1140 (No. 81-896, argued October 13, 1982).

power by pointing out that the ban applied "to all discussion of nuclear power, whether pro or con, in bill inserts." *Id.* at 537. Despite the fact that the regulation did not favor either side of a political controversy, this Court treated it as content-based:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

447 U.S. at 537. *See also Carey v. Brown, supra,* 447 U.S. at 462 & n.6 (statute was viewpoint-neutral, but it discriminated on the basis of the subject matter of the message and therefore had to be considered content-based).

A line of cases which applies the very rigorous standard of review which is applicable here began with *Police Department v. Mosley, supra,* where this Court stated:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

408 U.S. at 96. This principle was restated in *First National Bank of Boston v. Bellotti, supra*:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). If a legislature may direct

> business corporations to "stick to business," it may also limit other corporations – religious, charitable or civic – to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

435 U.S. at 784-85 (footnote omitted). *Carey v. Brown, supra,* is to the same effect. 447 U.S. at 471 (statute held to be unconstitutional because it "discriminates among pickets based on the subject matter of their expression"). Under these precedents, the lobbying restriction is "content-based," and thus it must be subjected to the very strict level of constitutional scrutiny applied to such restrictions.

II. THE DISCRIMINATION AGAINST LOBBYING BY CHARITIES DENIES TAXATION THE EQUAL PROTECTION OF THE LAWS.

In this case, the line drawn in section 501(c), which allows veterans' organizations to receive tax-deductible contributions and to lobby virtually without limitation, while denying that freedom of expression to charitable organizations, is unsupported by any legitimate governmental interest. (J.S. App. 66a). Even more clearly, the *compelling* interest required by applicable law cannot be demonstrated.

The government attempts to defend the disparity in treatment accorded lobbying by charities on the one hand, and that by veterans' groups on the other, by contending that it "is a rational means of furthering the underlying congressional purpose of providing tax benefits to those organizations worthy of receiving them" and that it

"derives also from the congressional policy, sharply defined in many contexts, against the use of large private contributions to distort the legislative process." Govt. Brief at 31. However, the legislative history in no way supports the government's assertions, nor would those reasons suffice if they were the basis for the discrimination.

A. The History Of The Restriction.

As described by the government, the restriction on lobbying by charities dates back to 1934. Govt. Brief at 16-17. Despite its frequent characterizations of what it believes the statute was designed to achieve, the government does not challenge the court of appeals' conclusion that the history "is sparse indeed." (J.S. App. 49a & n.31). The commentators are also in agreement that Congress never gave any clear explanation of the purpose for the restriction on lobbying by charities. Note, *Regulating the Political Activity of Foundations,* 83 Harv. L. Rev. 1843, 1845 (1970); Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations,* 59 Geo. L.J. 561, 564 (1971).[15]

The Senate Finance Committee proposed adding to the tax code the limitation that no group would qualify under what is now section 170(c)(2) if "participation in partisan politics" or "carrying on propaganda, or otherwise attempting to influence legislation" constituted a substantial part of its activities. 78 Cong. Rec. 5861 (1934). Senator Harrison, Chairman of the Finance Committee, observed that the amendment, as written, was deficient because it

[15]Perhaps even more significantly, there is no legislative history at all which explains why veterans' groups are *not* subject to any restriction on their lobbying.

applied to charities but not to war organizations (veterans' groups) receiving tax-deductible contributions under what is now section 170(c)(3). *Id.* Senator Harrison expressed the view that all organizations receiving contributions should be treated similarly with respect to lobbying. Senator Reed observed that a contribution to the National Economy League should not be deductible "if it is a selfish one made to advance the personal interests of the giver of the money," but he felt that the amendment as written went much further than the committee intended to go. Senator Couzens interjected that such groups as "the tuberculosis societies and the children's welfare societies" would not be affected because their lobbying would not be substantial. Senator Reed objected:

> I am not so sure. Take the case of those who are urging the adoption of the child-labor amendment: certainly they are not acting from selfish motives, and yet almost their entire activity is an effort to influence legislation.

With the discussion at this stage of irresolution, the Senate passed over the proposed amendment and went on to other business.

When the proposed amendment was next considered, it was passed by the Senate. 78 Cong. Rec. 5959. Before the voice vote was taken, Senator Harrison responded as follows to Senator Couzens' suggestion that the language might need to be changed:

> I may say to the Senate that the attention of the Senate Committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop

> that, so that is why we have put this amendment in the bill.

Senator Reed responded:

> Mr. President, I do not think the committee is proud of the language in which this amendment is couched. I know that the legislative drafting counsel who drew it expressed no pride whatever in their product; but I agree with the Senator from Michigan [Senator Couzens] that if the amendment shall be agreed to we will have from now until the conference to study the subject and prepare better phraseology.

The amendment was then passed without further discussion, save for a comment by Senator LaFollette that contributions to charities should not be deductible under any circumstances.

There was no further debate on the lobbying restriction, so far as Taxation is aware. As described by the government (Govt. Brief at 36-37 & n. 18), the only change made from the language originally proposed by the Senate Finance Committee was the deletion of the reference to "participation in partisan politics." This deletion was made at the request of the House conferees, who explained their reasons as follows:

> The Senate denied a deduction for contributions made to certain organizations, a substantial part of the activities of which was participation in partisan politics or carrying on propaganda or otherwise attempting to influence legislation. We were afraid this prohibition was too broad, and we succeeded in getting the Senate conferees to eliminate organizations, a substantial part of the activities of which was participation in partisan politics.

78 Cong. Rec. 7831. The present restriction on political activities by charities (which is not challenged in this litigation) was not added to the statute until 1954. *See* U.S. Congress, Joint Committee on Internal Revenue Taxation, *Summary of the New Provisions of the Internal Revenue Code of 1954 (H.R. 8300)*, at 70 (1955).

This legislative history of the 1934 legislation does not provide any enlightenment as to why the lobbying restriction was applied to charities but not to veterans' groups. *Amicus* VFW surely stretches the point when it describes what took place as "legislative deliberation," VFW Brief at 4, and the government's summary of the legislative history amounts to little more than the assertion that Congress must have had a sufficient reason for treating charities and veterans' groups differently, for otherwise it would not have done so. Govt. Brief at 32, 36-37 & n.18. Because the statutory classification at issue here, which regulates First Amendment freedoms, stands almost entirely without an expression of the purposes Congress may have sought to promote, this Court should be reluctant indeed to accept the conclusion, urged upon it by the government and the *amici* veterans' groups, that the lobbying restriction serves an important purpose.[16]

[16]The government suggests that the purposes underlying the imposition of the lobbying restriction on charities but not on veterans' groups may be divined from subsequent legislation and from the fact that the section 501(c)(3) lobbying restriction has not been eliminated in the years since it was passed in 1934. *See* Govt. Brief at 37-40. However, none of the episodes referred to sheds any light on why veterans' groups are granted a preferred status with respect to lobbying.

B. *Cammarano v. United States* Does Not Support The Discrimination Against Lobbying By Charities.

In attempting to justify the restriction imposed on charities, and the failure to impose a similar restriction on veterans' groups, the government relies heavily on *Cammarano v. United States*, 358 U.S. 498 (1959), contending that the lobbying restriction expresses the same policy as the regulations upheld in *Cammarano*. Govt. Brief at 10. In that case, this Court upheld the IRS' denial to business taxpayers of deductions for certain lobbying expenses, observing that the petitioners were "simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513.

The government finds in *Cammarano* a policy of "neutrality" toward lobbying, which it says relates back to the 1934 legislation. Govt. Brief at 6, 27. Since *Cammarano* involved only business lobbying, there was no occasion for the parties or the Court to discuss the discrimination between charities and veterans' groups which is the subject of this litigation. Moreover, no "neutrality" has existed between charities and veterans' groups since 1934, when the difference in treatment at issue here originated.[17]

Even if there had been a governmental policy of neutrality toward lobbying in 1934, or in 1959, there certainly was no such policy after *Cammarano* was "legislatively reversed" by the enactment of Internal Revenue Code section 162(e) in 1962. Note, *Regulating the Political Activity of Foundations, supra*, 83 Harv. L. Rev. at 1863

[17]Although this Court referred in *Cammarano* to the statutory restriction on lobbying by charities, it failed to note that veterans' groups did not labor under a similar restriction. 358 U.S. at 512.

n.95. *See* Govt. Brief at 19 n.8. Section 162(e) allows most lobbying expenditures by business taxpayers, whether directed at Congress or at the legislative body of a city or state, to be deducted for federal income tax purposes as an "ordinary and necessary" expense of carrying on a trade or business.[18] Thus, the fundamental premise on which *Cammarano* was based – that tax benefits were not to aid either side of a legislative controversy – has been removed. The American Bar Association has summarized the effect of the 1962 amendment:

> . . . [N]ow that direct business lobbying has become a deductible activity under § 162(e), the former "neutral posture of the tax law with respect to lobbying" (see Cammarano v. United States, *supra*) has been upset in favor of the business interests as opposed to the charitable organizations.

ABA Statement *reprinted in Influencing Legislation by Public Charities,* Hearing Before the House Committee on Ways and Means, 94th Cong., 2d Sess. 68 (1976).

More important, Congress certainly does not have any policy of being "neutral" toward lobbying, as the Senate Report on section 162(e) makes clear:

> It is also desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to Members of Congress or legislators at other levels of Government. The presentation of such information to the legis-

[18]Section 162(e) disallows deductions for expenditures in connection with attempts to influence the general public with respect to legislation – "grass roots" lobbying.

> lators is necessary to a proper evaluation on their part of the impact of present or proposed legislation.

S. Rep. No. 1843, 87th Cong., 2d Sess. 23 (1962); *see* H.R. Rep. No. 1447, 87th Cong., 2d Sess. 17 (1962). Federal policy in this area is one of encouraging participation in the legislative process, not discouraging it. *See generally Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., supra,* 365 U.S. at 137-38. The clear message which emerges from the Constitution and from the enactment of section 162(e) is that the free flow of information concerning the needs and preferences of citizens is essential to our system of government, and that this policy is as applicable to charities as to other categories of speakers. *See, e.g.,* Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities,* 46 Va. L. Rev. 439, 455-60 (1960); Caplin & Timbie, *Legislative Activities of Public Charities,* 39 Law & Contemp. Prob. 183, 198-99 (1975). Therefore, whatever effect *Cammarano* may have had on the constitutionality of section 501(c)(3) has been eliminated by the passage of section 162(e).[19]

C. None Of The Explanations Offered Justifies Prohibiting Substantial Lobbying By Charities While Permitting Veterans' Groups To Lobby Without Limitation.

1. The Justifications For The Lobbying Restriction On Charities Are Insubstantial.

By its very terms, the holding of *Cammarano* is limited to the proposition that *nondiscriminatory* denial of tax

[19]A statute must be evaluated in relation to the purposes alleged to support it at the time it is challenged, not the purposes which way have existed in the past but which are no longer valid. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 186-87 (1979); *id.* at 190-91 (Rehnquist, J., concurring in the judgment).

deductions is not unconstitutional. 358 U.S. at 513. Since this case involves discriminatory restrictions on lobbying, support for the statutory classification must come from sources other than *Cammarano*. The government refers to several other possible purposes, but none of them can withstand analysis.

First, it is said that the lobbying limitation has the purpose "of preventing abuses of charitable lobbying by private interests." Govt. Brief at 27. Even if it is assumed that preventing such "abuses" is a compelling purpose, the government never even explains what practices it believes are embraced by that term. It is suggested that some charities might really be fronts for private interests, but that possibility remains unproven, speculative, and unquantified. In any event, there is " 'no substantially relevant correlation between the government interest asserted and the State's effort' to prohibit [Taxation] from speaking." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 795. First of all, no organization can qualify under section 501(c)(3) unless it shows that it is "organized and operated exclusively" for charitable purposes. The IRS carefully scrutinizes exemption applications, annual exempt organization returns must be filed, and detailed audits are routinely carried out by the IRS. There has been no showing at all that "abuses," if there are any, are more likely to involve lobbying than litigation, publications, speeches, or any of the other types of activities which are used to promote charitable purposes.

Moreover, the lobbying restriction cannot be said to be "closely drawn to avoid unnecessary abridgment" of First Amendment rights, as is required by this Court's holdings in *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786, and *Buckley v. Valeo, supra,* 424 U.S. at 25. The sanction imposed on Taxation because it wishes to en-

gage in substantial lobbying is much broader than necessary to promote any governmental interest. Taxation must sacrifice deductibility for donors as to *all* contributions it receives, not just those used for lobbying. Denial of section 501(c)(3) status can, therefore, threaten a charity's ability to operate at all. *See* page 5 *supra*. This presents a striking contrast with *Cammarano*, where denial of a deduction for particular lobbying expenses meant only that the business had to bear all, rather than only a portion, of those particular expenditures. *See Harris v. McRae, supra*, 448 U.S. at 317 n.19; *Maher v. Roe, supra*, 432 U.S. at 474-75 n.8; *Cammarano v. United States, supra*, 358 U.S. at 515 (Douglas, J., concurring).

The asserted interest in preventing illegal diversion of charitable funds to improper purposes is "belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 793. The restrictions are overinclusive, since all substantial lobbying leads to a denial of section 501(c)(3) status, even if the lobbying is carried on solely to promote charitable purposes.[20] On the other hand, the statutory limitation is underinclusive because it does nothing to curb possible "abuses" by charities which do not involve lobbying, or to curb lobbying abuses by other groups. *See also Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (restriction on issuance of marriage licenses declared unconstitutional because it was

[20]Any legitimate concern about possible diversion of a charity's resources to private-interest lobbying would be limited to "private foundations" which do not have broad-based support from the public. A "public charity" like Taxation (*see* J.A. 22, 53) would not properly be the subject of such a concern. Congress has passed separate legislation dealing with private foundations, which are virtually prohibited from lobbying by the Tax Reform Act of 1969. *See* Internal Revenue Code §§ 509, 4945.

"grossly underinclusive" and "substantially overinclusive" in relation to purpose alleged to be served).

To the extent that the legislative history bears on the issue at all, it contradicts the government's assertion that the statutory classification was designed to prevent "abuses" by tax-exempt organizations. If that had been the purpose, the lobbying restriction would have been put into effect across-the-board, rather than only for charities. 78 Cong. Rec. 5861, 5959 (1934). Moreover, the conferees' decision to eliminate the proposed restriction on partisan political activities (78 Cong. Rec. 7831) would be utterly incomprehensible. Certainly, if Congress had been concerned about the improper diversion of charitable resources to serve private ends, it would not have banned substantial lobbying in furtherance of charitable purposes, while permitting partisan political activity by charities. If there is, as the government alleges, a sharply defined congressional policy "against the use of large private contributions to distort the legislative process," Govt. Brief at 31, and a corresponding policy to keep federal elections free from the power of money, *id.* at 31 n.14, those policies were not well served by the 1934 legislation.

Another purpose mentioned by the government as a possible justification for the statutory classification is that of "preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals." Govt. Brief at 27. Once again, this is a purpose for which the legislative history provides no support. It does not appear that any "balance" has ever existed between the lobbying activities of charities and private interests, nor could there be any serious suggestion that charities have the ability to drown out the voices of other speakers. More importantly, even with regard to direct election expenditures, this Court has held that "the

concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo, supra,* 424 U.S. at 48-49; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 790-91. It is plain that this argument cannot survive analysis.

The government suggests at several points that the imposition of a lobbying restriction on charities but not on veterans' groups reflects an attempt by Congress to deal with "the phase of the problem which seems most acute to the legislative mind." Govt. Brief at 14, 29, *quoting Buckley v. Valeo, supra,* 424 U.S. at 105. However, the deference which this Court normally accords to legislative decisions on which aspects of a problem are most in need of correction has no place in the analysis of regulation of First Amendment rights. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 215 (1975). *See also Schad v. Borough of Mount Ephraim, supra,* 452 U.S. at 77 (Blackmun, J., concurring).[21]

The inappropriateness of permitting the "one step at a time" approach in this area can be seen by examining what would happen if it were applied to other First Amendment issues. Thus, if a legislature could use this approach to deal with such "problems" as the littering caused by distribution of handbills, the noise and disruption attributable to residential picketing, or the inconveniences to residents caused by house-to-house canvassing, the government would possess almost unbridled power to

[21] The "one step at a time" argument might have some application to a typical tax statute not involving First Amendment rights, such as where Congress attempts raise revenue by taxing certain commodities or types of transactions while leaving others untaxed. Not only does the statute at issue here directly regulate First Amendment expression, but the government has never claimed that revenue considerations provide any basis for upholding the lobbying restriction.

silence certain speakers while permitting others to go on speaking. However, this Court has made it clear that a legislature cannot pick and choose among speakers in the same way it can adopt partial measures in other areas of public policy. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 215 ("even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinction"). When First Amendment interests are at stake, departures from the uniform pursuit of an asserted governmental purpose under a "one step at a time" rubric raise doubts as to whether that purpose is genuinely important. *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 520 (1981) (plurality opinion); *Schad v. Borough of Mount Ephraim, supra,* 452 U.S. at 73 n.14. *See* J.S. App. 64a n.43; Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 29 ("If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached.").

The government tries to dismiss the preferred treatment given veterans' groups relative to charities as involving only "unequal levels of government subsidy" rather than a governmental restriction on First Amendment rights. Govt. Brief at 13, 21-24, *citing Maher v. Roe, supra,* 432 U.S. at 475-76; *Harris v. McRae, supra,* 448 U.S. at 315-18, 321-22; *Buckley v. Valeo, supra,* 424 U.S. at 93-108. First of all, as discussed above at pages 18-23, when a governmental subsidy is withheld as a result of the exercise of First Amendment rights, the constitutional analysis must be the same as if a penalty had been imposed. For example, the claimant in *Thomas v. Review Board, supra,* was seeking to collect unemployment benefits, not to avoid some direct interference with his exercise of religious freedom, yet the penalty analysis was applied.

Taxation does not dispute that in attempting "to en-

courage actions deemed to be in the public interest," *Maher v. Roe, supra,* 432 U.S. at 476, Congress has considerable latitude. In *Maher v. Roe* and *Harris v. McRae, supra,* this Court held that Congress and the states may legitimately favor childbirth over abortions with respect to funding from public sources. However, the issue in this case does not concern actions by veterans' groups which Congress may properly try to encourage by financial support, but rather governmental favoritism with respect to the freedom of various groups to express opinions on legislation. Thus, as this Court indicated, if the government attempted to withhold health benefits or general welfare benefits from a woman because she sought an abortion, the regulation could not be upheld. *Harris v. McRae, supra,* 448 U.S. at 317 n.19; *Maher v. Roe, supra,* 432 U.S. at 474-75 n.8. Even more clearly, the statutes would have been unconstitutional if they penalized women for expressing their views on public issues, such as by advocating the right of women to have abortions. *Harris v. McRae, supra,* 448 U.S. at 356 (Stevens, J., dissenting). Yet such a restriction on speech is essentially what is challenged in this case. While the legislature is free to set social policy in certain areas, it "is constitutionally disqualified from dictating the subjects about which persons may speak and the persons who may address a public issue." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 784-85.

Buckley v. Valeo does not support the government's argument, either. Unlike the restrictions on speech involved in this case, *Buckley* addressed the issue of a *lowering* of existing barriers to participation in elections, by substituting public financing for private contributions. The Court found no denial of equal protection because the public funds were distributed in accordance with even-handed procedures designed to make sure that the public

funds did not "foster frivolous candidacies, create a system of splintered parties, [or] encourage unrestrained factionalism." 424 U.S. at 101. The discrimination challenged here is not based on such neutral and compelling concerns, but rather on the identities of the classes of speakers.

The *Buckley* Court also ruled that Congress could constitutionally provide public funds for presidential candidates who had to run in primaries, while denying funds to minor party candidates who were engaged in petition drives to qualify for state ballots. 424 U.S. at 105-08. However, this aspect of *Buckley* did not involve restrictions or penalties on the exercise of First Amendment rights by any candidate. The constitutional challenge was based on the fact that the financing was limited to primary elections, which was of no benefit to minor-party candidates who did not need to run in primaries. The Court upheld the statute because all candidates similarly situated (*i.e.*, those facing the expenses of primary elections) had an opportunity to qualify for funds. Not only had there been no showing that the abuses of campaign contributions at which the statute was aimed had occurred in petition drives, but public financing of petition drives would have implicated the same policies which justified the differing levels of public financial support in the general election. 424 U.S. at 106.

The aspects of the election financing program upheld in *Buckley* were considered by Congress to be essential to the attainment of the objectives of the program of which they were a part. Obviously, Congress could properly conclude that the success of the public financing system would be frustrated if it led to the multiplication of political parties. Likewise, this Court found that it was within Congress' authority to provide public financing to candidates facing

primary races, while not extending the program to cover petition drives. Congress could even require candidates to surrender certain freedoms when that was necessary to bring about the statutory objectives. *See Buckley v. Valeo, supra,* 424 U.S. at 57 n.65 (candidate's receipt of federal financing may be conditioned on agreement to abide by limitations on overall expenditures); Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1600 (1960). However, when the legislature does grant a benefit, it cannot do so in a manner which discriminates against the exercise of First Amendment rights. As Justice Frankfurter observed, "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." *American Communications Ass'n v. Douds,* 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring and dissenting).

Like the statute invalidated in *First National Bank of Boston v. Bellotti,* and several of the restrictions struck down in *Buckley v. Valeo,* the lobbying restriction at issue here represents legislative overkill which seriously impairs First Amendment rights without being closely tied to identified and important governmental purposes. The restriction has been accurately described by *amici* DAV/PVA as a "broad prophylactic," Brief at 20, but as such it cannot survive the searching scrutiny applied by this Court in cases involving the exercise of First Amendment rights.

2. There Are No Differences Between Charities And Veterans' Groups Which Justify Disparate Treatment With Respect To Lobbying.

The government and the *amici* veterans' groups have attempted to justify the statutory classification by pointing to a number of claimed differences between veterans' groups

and charities. However, to the extent that such differences may exist, they are of no constitutional significance.

The government suggests that the statutory classification is designed to guard "against the use of large private contributions to distort the legislative process" and to "keep federal elections 'free from the power of money.' " Govt. Brief at 31 & n.14. Not only are the asserted government interests in preserving the legislative and political processes from abuses entirely unsupported by the legislative history of this lobbying restriction, *see* pages 31-34 *supra*, but there has been no showing at all that veterans' groups are less prone to commit such "abuses" — whatever they may be — than are charities. In fact, partisan political activities by charities are specifically prohibited by a provision of section 501(c)(3) that is not challenged here, and so they are under at least as stringent a restriction in that regard as are veterans' groups. *See* Govt. Brief at 42 & n.21.[22] While it is true that veterans' groups may lobby only in furtherance of their exempt purposes (Govt. Brief at 43-44), a similar restriction is applicable to every charity, including Taxation, since qualification under section 501(c)(3) depends on an organization's proof that it is "organized and operated exclusively" for exempt purposes.[23] Similarly, the requirements that certain veterans' groups must be audited annually and must file reports on their activities (Govt. Brief at 42-43 n.22) do not go significantly beyond the annual returns which all exempt organizations must file with the IRS. The IRS certainly has at its disposal auditing and investigative authority

[22]Unlike charities, veterans' groups are permitted to sponsor political action committees. *See, e.g.*, VFW Brief at 1 n.1.

[23]In the case of veterans' groups, lobbying on issues such as the Panama Canal treaties is apparently considered to be within their exempt purposes. *See* VFW Brief at 25 n.38.

which is sufficient to assure that charities, like veterans' groups, are in compliance with the law.[24]

The government would have this Court treat the preferred status granted lobbying by veterans' groups as just another type of veterans' preference to discharge "a special debt" to those who have served our country. Govt. Brief at 14, 29-30, 45-49. Taxation does not dispute that veterans may properly be granted many types of benefits, such as pensions, medical care, educational subsidies, reemployment rights, and even other tax benefits. Thus, in *Johnson v. Robison*, 415 U.S. 361 (1974), this Court upheld the statute which granted educational benefits to veterans but not to conscientious objectors, because the classification made service in the armed forces more attractive and helped to compensate for the unique disruption of one's career and personal life caused by being in the military. However, as the court of appeals observed, "First Amendment rights may not be used as a type of 'currency' to reward those who have rendered service to the nation or who are otherwise determined to be worthy." (J.S. App. 67a). If Congress wishes to utilize the services of veterans' groups to provide assistance to veterans, it may certainly do so. But the fact that veterans are entitled to preferred

[24]Several of the *amici* appear to suggest that the preferred treatment accorded veterans' groups with respect to lobbying is due to direct congressional oversight of such lobbying to assure that it is proper. *See* DAV/PVA Brief at 17; Am. Legion Brief at 16. However, the disclosure of lobbying activities is already required by the Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.*, which withstood a constitutional challenge in *United States v. Harriss*, 347 U.S. 612 (1954). If further regulation of lobbying is deemed desirable, Congress must adopt the least restrictive measures which would accomplish its purposes. Substantial lobbying by charities could not be prohibited, as it is under section 501(c)(3), when the regulatory objective could be accomplished by additional disclosure requirements or other steps short of prohibition. Indeed, *Harriss* demonstrates that even disclosure requirements can raise serious constitutional issues.

treatment in some respects, and that veterans' groups may play a role in helping to deliver some of those benefits, cannot elevate the groups to a preferred position with respect to the exercise of First Amendment rights.[25]

Much of the extensive argument provided by the *amici* veterans' groups seems to be directed to proving that veterans' groups are engaged in many socially useful activities, including their charitable work and their participation in the administration of certain veterans' benefit programs. *See* Am. Legion Brief at 16-17. These activities, while laudable, are entirely beside the point. Every group exempt under section 501(c)(3) must also devote itself exclusively to socially beneficial activities approved of by Congress, be they educational, scientific, or charitable.

To the extent that Congress wishes to put into effect additional programs to benefit veterans directly, it surely is free to do so. Thus, for example, Congress could presumably make provision for the reimbursement of the expenses which veterans' groups incur in representing vet-

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[25] *Amici* Disabled American Veterans and Paralyzed Veterans of America argue that great deference should be given to the congressional judgments reflected in section 501's treatment of lobbying because Congress must be allowed to control its own collection of information. DAV/PVA Brief at 6-10. This argument fails to take into account the fact that the lobbying restriction complained of by Taxation applies to lobbying at all levels of government — local, state, and national. Moreover, veterans would certainly not stop providing Congress information concerning the programs which benefit them, even if Congress withdrew the preferred treatment they now enjoy with respect to lobbying. In any event, Congress cannot avoid constitutional requirements, even if it is passing legislation which deals with lobbying, just as the voters cannot use the initiative process to circumvent the Constitution. *See Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 295. *See also Powell v. McCormack,* 395 U.S. 486 (1969); *Henrico Professional Firefighters Ass'n v. Board of Supervisors,* 649 F.2d 237, 242-43 (4th Cir. 1981) (county board of supervisors may not refuse to listen to certain presentations because of the identities of the speakers).

erans who are pursuing claims under the various benefit programs. *See* DAV/PVA Brief at 26-27. This would be similar to the direct subsidy already provided to veterans' groups in the form of office space. 38 U.S.C. § 3402. Moreover, to the extent that Congress desired a report prepared on a particular topic, such as the needs of veterans, it could commission a qualified organization to prepare such a report, or to reproduce additional copies of a document which had already been prepared (*see* 44 U.S.C. § 1332). What Congress cannot do is what it has done in the present statutes – to favor one class of speakers (veterans' groups) over another (charities) with respect to speech concerning the important public issues raised by legislation.

The government and the *amici* engage in wide-ranging speculation in an effort to identify some meaningful distinction between veterans' groups and charities which might justify the statutory discrimination with respect to lobbying. Differences between the groups are not difficult to find, but listing them in no way establishes that they have any bearing at all on the constitutional issue before the Court. For example, it makes no difference that the "object of veterans' groups' legislative activity, derived from the consensus of their memberships, would predictably be the advancement of veterans' programs." DAV/PVA Brief at 18. While it is true that charities lobby on a broad range of issues, and that different charities may even find themselves on different sides of the same issue, the difference between groups which share a particular outlook and those which reflect a range of opinions cannot possibly constitute a constitutionally sufficient reason for allowing the former category to lobby but not the latter. No matter what the alignment of groups or the positions taken, the availability to Congress of better informa-

tion on how legislation will affect interested parties can be expected to enhance the legislative process. That was the broad public policy which led to the adoption of section 162(e) with respect to business lobbying, and it is equally applicable to lobbying by veterans' groups and charities alike.

D. The Restriction On Lobbying By Charities Should Be Eliminated.

Because the essence of an equal protection claim is a disparity of treatment between classes of similarly situated persons, a constitutional violation can at least theoretically be remedied either by improving the treatment accorded the disfavored class, or by eliminating the advantage enjoyed by the class which has benefited by the classification. However, Taxation is not aware of any case in which an advantage has been withdrawn rather than being extended to cover the party raising an equal protection challenge. Moreover, under the circumstances presented here, extension of the right to lobby to charities is plainly the appropriate remedy.[26]

"In choosing between [the] alternatives, a court should

[26]Because 26 U.S.C. § 7428 only permits an organization to obtain a declaratory judgment as to its own tax status, it is highly doubtful that a district court even has the authority in a section 7428 action to make a declaration as to the tax status of organizations other than the plaintiff. *See* Govt. Brief at 11 ("it is highly questionable whether a court can expand the scope of a lawsuit directed toward achieving specific relief and embark upon a remedial course neither requested nor desired by appellee, that would impose restrictions upon approximately 35,000 veterans' organizations which are not parties to the litigation."). Even if a request for such relief can properly be made, no party sought such relief in this case. Nor is it apparent who, if anyone, would have standing to use section 7428 to seek revocation of tax benefits enjoyed by other organizations which have already qualified under section 501(c).

attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott,* 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part). *See generally* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 Cleveland St. L. Rev. 301 (1979). Many cases in which this issue has come up have involved equal protection challenges to underinclusive federal benefit statutes, and this Court "has suggested that extension, rather than nullification, is the proper course." *Califano v. Westcott, supra,* 443 U.S. at 89. Thus, this Court has ordered benefit statutes to be extended in order to eliminate an equal protection violation even when the result has been a substantial expenditure of public funds. But in this case the government has never contended that elimination of the lobbying restriction which is being challenged would have any significant adverse impact on the Treasury. In fact, the government has never argued that the extension of the restriction to veterans' groups, rather than its elimination, is the proper remedy.

Moreover, the choice of remedy in this case should take into account the important First Amendment interests involved here which are not typically present in social security or other benefit cases. In past equal protection cases involving First Amendment rights, this Court has invalidated discriminatory restrictions on speech without even discussing the theoretical possibility of extending the restriction. *See, e.g., Carey v. Brown, supra; Police Department v. Mosley, supra.* Likewise, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC,* 593 F.2d 1102 (D.C. Cir. 1978) where the court, sitting *en banc,* found that a requirement that non-commercial broadcasters retain tapes of certain programs violated

equal protection principles because no similar restriction was imposed on commercial broadcasters, it struck down the requirement rather than extending it to cover the commercial broadcasters. *See also Greenberg v. Bolger,* 497 F. Supp. 756, 784-86 (E.D.N.Y. 1980) (advantageous postal rate extended to excluded parties rather than being eliminated for all parties).

Therefore, any resolution of this controversy which extended the restriction on lobbying to cover veterans' groups should be disfavored because it would inevitably dampen the exercise of rights which lie at the core of the First Amendment. In the absence of an explicit legislative command, this Court should not permit invalidation of a statute to become an occasion for further restricting free speech rights. If some new restriction on lobbying is to be developed to replace the statute declared unconstitutional by the court of appeals, that task should be undertaken by Congress, not the courts.

* * *

"When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown, supra,* 447 U.S. at 461-62. Under this standard, the statutory classification at issue here must fall. Lobbying by charities in furtherance of their exempt purposes has not been shown to pose any threat to compelling governmental interests, nor has it been shown that the disparate treatment of lobbying by charities and by veterans' groups is justified by any finely tailored and constitutionally legitimate distinction.

CONCLUSION

The judgment of the court of appeals should be affirmed to the extent that it declares the restriction on lobbying by charities to be unconstitutional, and Taxation should be held to be entitled to a tax exemption under section 501(c)(3).

Respectfully submitted,

John Cary Sims
(Counsel of Record)

Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

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